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No. 97-1977

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In The

Supreme Court of the United States

October Term, 1997

THE YWCA OF OKLAHOMA CITY, CENTURY MARTIAL ARTS SUPPLY, INC., E & H TRANSFER, INC., CITY GLASS CO., FLIP'S WINE BAR & TRATTORIA, INC., MANGUM BRICK COMPANY, RONNIE'S SIGNS, INC., DALMARC ENTERPRISES INCORPORATED, BARBARA J. WILSON, OKLAHOMA STEEL & WIRE, INC., C & H POWER LINE CONSTRUCTION, INC., CHRIS HUNT WATER HAULING, INC., JOHN VANCE MOTORS, INC. and TROY WESTNIDGE, INC.,

Petitioners,

v.

SELF INSURERS' MANAGEMENT GROUP,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Oklahoma

REPLY TO SELF INSURERS' MANAGEMENT GROUP'S BRIEF IN OPPOSITION

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REPLY TO STATEMENT OF THE CASE

The undersigned Petitioners are obliged to address several serious errors contained in the first three pages of the Brief of Self Insurer's Management ("SIMG") Brief in Opposition. The following errors are addressed, to-wit:

1. The Petitioners paid every dime of their insurance premiums. The Respondent's statements to the contrary are simply wrong. Respondent's Petition in the district court of Oklahoma County was a suit to hold Petitioners jointly and severally liable for over $2 million in financial deficits of the association. *See* Judgment in Petitioner's Appendix No. 26, to-wit:

> . . . Plaintiff's claims in its Petition, as amended March 31, 1994, seeking judgment against said Defendants in the amount of $2,500,000, both jointly and severally . . .

Hardly unpaid premiums.

2. On page 3 Respondent states "Simply stated, Petitioners are employers buying business insurance, not purchasers of securities." As indicated by the Record – *See* Appendix No. 47 and 48, & ¶ 3 through 7, the Petitioners thought they were buying business insurance and ended up as an "owner" of the Association, allegedly jointly and severally liable for millions of dollars. **A circumstance more in need of the financial disclosure requirements of securities laws and regulations is hard to imagine, especially given that this is a nation-wide problem.** *See* Petitioners' Joint Petition for Writ of Certiorari, pp. 3 and 4.

3. The Respondent erroneously interprets the Petitioner's statement as cited on page 2 of Respondent's opposition brief. The *sole* basis upon which the Oklahoma Supreme Court relied to deny protection of *federal* securities laws was the application of the McCarran-Ferguson Act. The Petitioners fully recognize the Oklahoma Supreme Court cited an additional reason for reversing the local District Court – they were also denied protection of the state securities laws. This improper retroactive application of subsequent Legislation was thoroughly reviewed in Proposition II, pp. 15-18, Petitioners' Joint Petition for Writ of Certiorari.

REPLY TO RESPONDENT'S "REASONS FOR DENYING THE WRIT"

Under sub-heading **1.a.** the Respondent *admits* that the 1933 Securities Act "exception" is limited to an insurance policy and "like contracts". These statements establish the *Petitioners'* position that the Securities Act of 1933 was intended to apply, since the "agreements" at issue resulted in the Petitioners becoming owners/shareholders of the insurance association, rather than simply purchasing an insurance policy.

Under sub-paragraph **1.b.**, the Respondent attempts to distinguish numerous authorities cited by the Petitioners which hold that a key element [to exempt the subject agreements from the protection of securities laws under the McCarran-Ferguson Act] is whether "**the practice is limited to entities within the insurance industry.**" Not only was the Respondent unable to cite any

authority to the contrary, these cases clearly establish that if the McCarran-Ferguson Act is to exempt the "subject agreements" from securities laws, the "agreements **must be limited to entities within the insurance industry**. *See Hartford Fire Insurance Co. v. California*, 509 U.S. 764 at 781, 113 S.Ct. 2891 at 2901, 125 L.Ed.2d 612 (1993); *Union Labor Life Insurance Co. v. Paranee*, 458 U.S. 119 at 129, 102 S.Ct. 3002 at 3008, 73 L.Ed.2d 647 (1982).

Clearly, no one can argue that the Petitioners herein were in the "business of insurance" and "entities within the insurance industry", i.e. the YWCA, a martial arts supply company, a restaurant, a sign company, etc. As held by the United States Supreme Court as early as 1969 in *Securities and Exchange Commission v. National Securities, Inc.*, 393 U.S. 453 at 459, 89 S.Ct. 564 at 568 (1969); "the statute [McCarran-Ferguson Act] did not purport to make the state supreme in regulating all the activities insurance *companies*; its language refers not to the person or companies who are subject to state regulation, but to laws "regulating the *business* of insurance".

Applying this holding, the Petitioners may have thought they were purchasing insurance policies, but instead they became "owners" of an insurance association and allegedly jointly and severally liable for millions of dollars in financial deficits of the association. Laws designed to protect the "purchasers" of an ownership interest in an insurance association or company *are* the financial disclosure requirements of the Securities Acts.

THE "RETROACTIVE" LEGISLATIVE AMENDMENT

The Respondents attempt to justify the Oklahoma Supreme Court's retroactive application of a legislative amendment specifically exempting the "agreements" from the Oklahoma Securities Act. This law was passed *after* the Petitioners prevailed, in part, on that very basis in the District Court. The Respondent relies upon the language of the Oklahoma Supreme Court which states "we held that where a prior enactment is ambiguous, there is a presumption that subsequent legislatures amending the act was designed to clarify its text." The "ambiguity" is *imaginary*, as there was no previous language in the act that mentioned Oklahoma securities laws in any form. The "clarification" logic is misplaced, at best.

Further, the "highlight" of the Respondent's brief appears on page 13 as follows:

> "This highlights the Petitioners' failure to raise at trial court and properly preserve on appeal the issue of 'vested interest.' This failure to raise the issue precludes jurisdiction by the U.S. Supreme Court under its Rule 14(g)(i)."

It would take, indeed, a **crystal ball of considerable clarity** for the Petitioners herein to pre-conceive in the lower court that Respondents would run to the Oklahoma Legislature following their defeat in the district court and obtain a change in the law; and the Oklahoma Supreme Court would then retroactively apply this new "statutory exemption" from the Oklahoma Securities Act to the Petitioners' agreements. This issue was raised at the very *first* opportunity by Petitioners in their Oklahoma Supreme

Court Petition for Rehearing. *See* Petitioners' Appendix Nos. 80 through 84.

CONCLUSION

WHEREFORE, having replied to Respondent's arguments, including the *gross misstatement* that the Petitioners did not pay their insurance premiums; and having shown the necessity for application of **financial disclosure requirements** of both federal and local securities laws to this growing nationwide problem of small businesses becoming owners/shareholders of insurance associations, the Petitioners **HEREBY PRAY** that this Court address this issue. The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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